No. 330

In the Supreme Court of the United States

OCTOBER TERM, 1918

THE UNITED STATES OF AMERICA, APPELLANT

vs.

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA, THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

IN THE

District Court of the United States

FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 4729-47

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, THE PENNSYLVANIA RAILROAD COMPANY, THE VIRGINIAN RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, ATLANTIC COAST LINE RAILWAY COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, NORFOLK SOUTHERN RAILWAY COMPANY, DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final judgment of the district court entered in this case on July 26, 1948. A petition for appeal is presented to the district court herewith, to wit, on August 25, 1948.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this case is conferred by Section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220 (28 U.S.C. Supp. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U.S.C. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Interstate Commerce Commission v. *Mechling*, 330 U. S. 567

Interstate Commerce Commission v. *City of Jersey City*, 322 U. S. 503

McLean Trucking Co. v. *United States*, 321 U. S. 503

STATUTES INVOLVED

Section 24 of the Judicial Code, as amended, 28 U. S. C. 41(28), provides in part:

> The district courts shall have original jurisdiction as follows:
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> * * * * *
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> Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Section 208 of the Judicial Code, as amended, 28 U. S. C. 46, provides in part:

> Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. * * *

Section 212 of the Judicial Code, as amended, 28 U. S. C. Supp. 45a, provides in part:

> The Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court,[1] and in the Supreme Court of the United States upon appeal from the Commerce Court. * * * *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; * * * *Provided further*, That * * * the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein.

Section 17(9) of the Interstate Commerce Act, as amended, 49 U.S.C. Supp. 17(9), provides:

> When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or

[1] The Urgent Deficiencies Act of October 22, 1913, 38 Stat. 220, transferred jurisdiction of suits to set aside orders of the Interstate Commerce Commission from the Commerce Court to specially constituted three-judge district courts.

reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

THE ISSUES AND THE RULING BELOW

This is an action brought by the United States to set aside an order of the Interstate Commerce Commission which had dismissed a complaint filed with it in the proceeding known as *United States of America* v. *Aberdeen & Rockfish Railroad Company, et al.*[2] In this complaint the United States had sought an award for the damages which it had sustained because of the failure and refusal of certain railroads to provide wharfage and handling services, or to make an allowance in lieu thereof, on through rail-water shipments made by the Government which had moved over Army Base Piers 1 and 2 at Norfolk, Virginia, while these piers were being operated by the Army, i.e., from June 14, 1942, to about November 6, 1946. It was alleged that as a result of such failure and refusal the charges exacted of the Government were unjust and unreasonable, in violation of Sections 1(5)a and 1(6) of the Interstate Commerce Act; unjustly discriminatory, in violation of Section 2 of the Act; prejudicial to military traffic, in violation of Section 6(8) of the Act; and excessive in that no allowance was made to the owner for the

[2] For the Commission's report and order, and two prior reports in the same proceeding, see 269 I.C.C. 141, 264 I.C.C. 683, 263 I.C.C. 303.

use of its facilities in transportation or for its rendition of services connected with transportation, in violation of Section 15(13) of the Act.

The Government's petition, filed in the court below pursuant to the provisions authorizing suits to set aside orders of the Interstate Commerce Commission (28 U.S.C. 41(28), 43-48), named as defendants the Interstate Commerce Commission and the United States.[3] The Commission in its answer alleged that the district court lacked jurisdiction over the cause upon the ground that Section 9 of the Interstate Commerce Act gave the petitioner an election to file a complaint with the Commission or to bring suit against the railroads in a federal district court, and estopped petitioner, after it had elected to pursue the former remedy, from securing judicial review of the order entered by the Commission in the complaint proceeding. The Commission also pleaded, as an alternative defense, that its order of dismissal was valid.

The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railway Company, Seaboard Air Line Railroad Company, and Norfolk Southern Railway Company intervened as defendants pursuant to their statutory right to do so (28 U.S.C. Supp. 45a). The railroads' answer denied that the district court had jurisdiction over the cause and, in the alternative, asserted that the Commission's order was in all respects valid. The grounds given for the court's alleged lack of jurisdiction were: (a) that there was no

[3] The latter was named a defendant because of the statutory requirement (28 U.S.C. 46) that a suit of this kind be brought against the United States.

cause or controversy since in this action the United States was both plaintiff and defendant; (b) that the statute providing for suits to set aside orders of the Interstate Commerce Commission does not authorize the United States to institute such a suit, and (c) that such statute does not authorize a suit to set aside an order of the Commission which denies reparation for alleged prior violations of the Interstate Commerce Act.

The statutory three-judge district court held that Congress, when it enacted the statute governing suits to set aside orders of the Interstate Commerce Commission, did not intend to permit the United States to bring such a suit. The court, having determined that the statute does not authorize maintenance of the present action, did not reach the merits of the case. Nor did the court rule on the defense contention that the statute authorizing review of orders of the Interstate Commerce Commission does not comprehend an order of the type here involved.

THE QUESTIONS ARE SUBSTANTIAL

The appeal taken in this case presents the question whether the statute authorizing judicial review of orders of the Interstate Commerce Commission withheld such right of review from the United States. The Government is at all times a substantial shipper of commodities and in time of war may be the principal shipper. The Government, in its capacity as a shipper, is clearly entitled to claim the benefits of, and to assert the rights accorded by, the regulatory provisions of the Interstate Commerce Act. The decision of the district court means that the Government, alone among all other shippers, is denied judicial

review when it believes that rights which it asserts under the Act have been erroneously determined by the Commission. Furthermore, under the grounds upon which the district court rested its decision, review by the United States is equally barred whether the order sought to be questioned deals with future or past rates, charges, or practices. The question raised by the appeal, the Government's right to maintain this action, therefore presents an issue of large importance and a question of law of substance on which this Court has not heretofore passed. See, however, *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567; *McLean Trucking Co.* v. *United States*, 321 U. S. 67; *Mitchell* v. *United States*, 313 U. S. 80.

A second substantial question which the appeal will present is whether an order of the Commission dismissing a complaint seeking an award of the damages sustained by the complainant by reason of carrier rates, charges, or practices alleged to have been in violation of the Act, is an order of a kind which is reviewable under Section 208 of the Judicial Code (28 U.S.C. 46). The Government contends, but the defendants deny, that *El Dorado Oil Works* v. *United States*, 328 U. S. 12, establishes the reviewability of such an order. It is of vital concern to both shippers and carriers that this question be conclusively determined.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 25, 1948.

Filed June 28, 1948. Harry M. Hull, Clerk

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4729-47

UNITED STATES OF AMERICA, PLAINTIFF,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, DEFENDANTS

Before CLARK, Associate Justice, United States Court of Appeals for the District of Columbia; and McGUIRE and HOLTZOFF, Associate Justices, District Court of the United States for the District of Columbia, sitting as a statutory three-judge court.

HOLTZOFF, J.:

This is an action brought before a statutory three-judge court to set aside an order of the Interstate Commerce Commission, dismissing a complaint of the United States, by which the United States sought an allowance from certain railroads for wharfage and handling services rendered in connection with shipments made by the Government during World War II at Norfolk, Virginia. The action is brought under the Urgent Deficiencies Act (U. S. Code, title 28, sec. 41, par. 28, and secs. 43-48) and under Section 9 of the Interstate Commerce Act (U. S. Code, title 49, sec. 9).

For a great many years it had been the general practice of railroads serving North Atlantic ports, including Norfolk, to load and unload from car

to pier, and vice versa, traffic brought to the port by rail and intended to be transhipped by vessel. The charges for this service, known as wharfage, were included and absorbed in the railroad traffic rates. At the Port of Norfolk, the cost of this labor to the railroads was four cents per hundred pounds. This sum constituted the compensation paid by the carriers to The Transport Trading and Terminal Corporation, which actually performed this task in their behalf.

During World War II, the War Department shipped a substantial volume of goods from various points in the United States to Norfolk over the trunk line railroads serving that port, for transportation by vessel to points beyond Norfolk, as well as from points beyond Norfolk to points in the interior. Due to the emergency the Government took over the piers at which these goods were handled, and performed the wharfage services itself with its own employees. Nevertheless, the railroads persisted in charging and the Government continued to pay the full traffic rate for transportation, which included four cents per hundred pounds as cost of wharfage.

In view of the fact that the Government had performed the service itself, the United States filed a complaint with the Interstate Commerce Commission praying for reparation at the rate of four cents per hundred pounds on all of the goods that were handled by the Government at Norfolk in the above described manner. The Interstate Commerce Commission dismissed the complaint, on the basis of a finding that the refusal of the railroads to make the allowance to the United States for the wharfage services performed by the Government itself on its own shipments, was not an unsound or unreasonable practice, did not result in unreasonable or inapplicable rates and was not unjustly discriminatory to the United States. *United States* v. *Aberdeen & Rockfish RR. Co.*, 263 I.C.C.

303 and 264 I.C.C. 683. Thereupon the present action was brought to review the decision of the Interstate Commerce Commission and to set aside its order, which had been issued on July 25, 1947.

At the outset it becomes necessary to determine whether this action may be maintained. Section 9 of the Interstate Commerce Commission Act (U. S. Code, title 49, sec. 9, provides as follows:

> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt . . . ."

In other words, the law accords two alternative remedies to any person who is damaged by any action of a common carrier violative of the Interstate Commerce Act. The injured party either may make a complaint to the Interstate Commerce Commission or may bring an action for damages against the carrier in the District Court of the United States. The two remedies are mutually exclusive. In this instance, the United States did not choose to bring suit against the railroads in the District Court of the United States, but elected to present a complaint to the Interstate Commerce Commission. The United States now seeks a review of the adverse decision of the Commission by an action brought before a three-judge court.

The statute regulating actions to review orders of the Interstate Commerce Commission (U. S. Code, title 28, sec. 46) provides, in part, as follows:

> "Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States . . ."[4]

An action of this type is a suit against the United States, *United States* v. *Griffin*, 303 U. S. 226, 238.

In other words, a suit to review an order of the Interstate Commerce Commission must be brought against the United States as the defendant. Accordingly, in this action the United States of America is named both as the petitioner and as the defendant. The Interstate Commerce Commission is added as a co-defendant, although there seems to be no warrant in law for this course.[5] We are thus confronted with an anomaly,—a suit by the United States of America against the United States of America.

The United States is not a mere nominal party defendant. The legislative history of the above-mentioned statute demonstrates that the Congress deliberately and intentionally provided that such suits should be brought against the United States and that his requirement was no inadvertence. It was first introduced into the law by the Act which created the Commerce Court (Act of June 18, 1910, Sec., 3, 36 Stat. 539, 542). The provision was debated at length on the floor of each House. These discussions clearly indicate that it was the intention of the authors of the legislation that the Attorney General of the United States should appear in behalf of the United States and defend the action of

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[4] Such an action must be heard by a three-judge court, U. S. Code, title 28, sec. 47.

[5] The law authorizes the Commission to intervene in the suit, but does not provide for making the Commission a party defendant originally, U. S. Code, title 28, sec. 45a.

the Interstate Commerce Commission.[6] Attempts were made to modify this provision in order that the action might be brought against the Interstate Commerce Commission, rather than against the United States, but these endeavors were defeated. It is clearly, therefore, the duty of the Department of Justice to defend the order of the Interstate Commerce Commission. Necessarily, the Department may not be on both sides of the case. Yet an examination of the petition filed by the United States, and of the answer filed in its behalf, indicates that both pleadings were signed by the same Assistant Attorney General.

No person may sue himself, *Lord* v. *Veazie*, 8 How. 250; *Cleveland* v. *Chamberlain*, 66 U. S. 419; *Wood Paper Co.* v. *Heft*, 8 Wall. 333. This principle is applicable to the United States. The Government may not sue itself. This is true even

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[6] Senator Elihu Root made the following statement on the floor of the Senate (45 Cong. Rec. p. 4164):

> "The Attorney General would be bound upon all and the highest considerations of his professional honor and his official duty to defend the order of the Interstate Commerce Commission in all courts having jurisdiction to review it."

Representative Townsend said on the floor of the House of Representatives (45 Cong. Rec. p. 5525):

> ". . . when it (i.e. an order of the Interstate Commerce Commission) is attacked it becomes the duty of the Attorney General to defend."

Senator Sutherland (later Mr. Justice Sutherland) said (45 Cong. Rec. p. 6457):

> "The order of the Interstate Commerce Commission is quasi legislative, and, as I have said, it becomes, in substance and effect, the order of the Government of the United States, and it simply occurs to me that it is more fitting that the action to have the order declared invalid as invading the constitutional rights of the railroad company should proceed against the Government of the United States than it is to have it proceed against the Interstate Commerce Commission."

if the nominal plaintiff is a party who is subrogated to the rights of the Government. *Globe & Rutgers Fire Ins. Co.* v. *Hines*, 273 Fed. 774, 777; *Defense Supplies Corp.* v. *United States Lines Co.*, 148 F. (2d) 311.

In *Globe & Rutgers Fire Ins. Co.* v. *Hines*, *supra*, the court stated (p. 777):

> "It is elementary that the same person cannot be both plaintiff and defendant at the same time in the same action. It is incongruous that the same person should direct and conduct both the prosecution and the defense of the same suit, no matter in what capacity he may appear."

It may be observed in this connection, that the United States of America always acts in a sovereign capacity. It does not have separate governmental and proprietary capacities, *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477.[7]

The foregoing rules are but applications of the general doctrine that Federal courts may deal only with actual cases and controversies, *Muskrat* v. *United States*, 219 U. S. 346; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 239-241. Naturally there cannot be a controversy if the same party is both plaintiff and defendant. If attorneys representing the Department of Justice appear on both sides of the same case, there is no actual controversy, but merely a discussion or debate of a moot question.

It is the view of this court, therefore, that this action may not be maintained, as the United States of America is both plaintiff and defendant. This conclusion is accentuated by the fact that it is the duty of the Department of Justice under the statute to defend the action of the Interstate Commerce Commission.

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[7] *United States* v. *Horowitz*, 267 U. S. 458, which holds to the contrary, must be deemed to have been overruled by *Graves* v. *N. Y. ex rel. O'Keefe*, cited in the text.

The cases on which the Government relies are not in point. In *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 573, the plaintiffs in the action brought before the three-judge court were A. L. Mechling, a water carrier, the Inland Waterways Corporation, and the Secretary of Agriculture. The later was authorized by a specific statutory provision to seek judicial relief with respect to rates and charges for the transportation of farm products. Consequently, it was not a case in which the United States was both plaintiff and defendant.

In *United States* v. *Public Utilities Commission*, 151 F. (2d) 609, a direct appeal was taken from an order of an administrative agency. This case, too, did not involve a situation in which the same party, the United States of America, was both plaintiff and defendant.

It is further urged that an order of the Interstate Commerce Commission of the type involved in this case is not reviewable in an action brought before a three-judge statutory court. This position is clearly sustained by *Ashland Coal & Ice Co.* v. *United States*, 61 F. Supp. 708; affirmed 325 U. S. 840, in which Judge Dobie wrote an exhaustive and persuasive opinion. It is argued, however, that this decision has been, in effect, overruled in *El Dorado Oil Works* v. *United States*, 328 U. S. 12. The opinion in the *El Dorado* case does not refer to the *Ashland* case. Whether the *Ashland* case must be deemed overruled, need not be decided, in view of the disposition heretofore indicated.

It has been suggested that unless the United States of America may maintain this action, it is without a remedy. This contention is hardly well-founded, because the United States has the opportunity of electing the other alternative remedy provided by the statute, namely, to bring suit against the common carriers in the United States District Court. Under any circumstances, this

Court must enforce the will of the Congress, which clearly did not contemplate or intend to permit a suit by the United States of America against the United States of America, to review an order of the Interstate Commerce Commission. If the situation here presented is a *casus omissus*, the remedy lies solely with the legislative branch of the Government.

In view of the foregoing considerations, we do not reach the merits of the case.

Judgment dismissing the complaint.

(S.) BENNETT C. CLARK,
Justice.

(S.) MATTHEW F. MCGUIRE,
Justice.

(S.) ALEXANDER HOLTZOFF,
Justice.

JUNE 28, 1948.

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